

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JAN 14 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0203-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DANIEL JAMES PORTER,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-31818

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

D. James Porter

Florence
In Propria Persona

B R A M M E R, Judge.

¶1 In 1992, a jury found petitioner Daniel James Porter guilty of two counts of first-degree murder and one count of first-degree burglary. The trial court sentenced Porter to two terms of life imprisonment on the murder convictions and fifteen years on the burglary conviction, all to be served consecutively. On appeal, we ordered that his sentence for the burglary conviction be served concurrently, rather than consecutively with the other

sentences imposed, but otherwise affirmed his convictions and sentences. *State v. Porter*, No. 2 CA-CR 92-1037 (memorandum decision filed May 21, 1996).

¶2 Porter filed his first notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in 1998. The trial court granted his request to amend the sentencing order to reflect our decision on appeal but otherwise denied relief, and we denied any further relief on review. *State v. Porter*, No. 2 CA-CR 98-0532-PR (memorandum decision filed July 27, 1999). In February 2000, Porter filed a second Rule 32 notice, but he failed to file a petition when due, and the proceeding was dismissed.

¶3 Porter filed his third Rule 32 notice in July 2007. After appointed counsel notified the trial court that he had reviewed the available record and could find no arguable issue that would entitle Porter to Rule 32 relief, Porter filed a supplemental petition alleging he had been unfairly sentenced to consecutive terms of imprisonment. He argued the court had relied on his 1986 conviction for aggravated assault when imposing sentence, and according to Porter, the judge who had presided over the 1986 trial had been “an active felon” at the time, as allegedly established by the judge’s 1996 conviction for violating federal tax law. *See In re Scholl*, 200 Ariz. 222, 223, 25 P.3d 710, 711 (2001). Porter maintained the judge had been engaged in criminal conduct at the time of his trial in 1986 and Porter was therefore denied a fair trial in violation of his right to due process under the United States Constitution.

¶4 The trial court dismissed Porter’s petition, finding Porter had waived his claim by failing to raise it on appeal or in a previous Rule 32 petition. *See Ariz. R. Crim. P.*

32.2(a). The court also found Porter had failed to state a colorable claim within the scope of Rule 32 and had presented no material issue of fact or law that would entitle him to relief. The court reasoned that Porter's claim was an impermissible collateral attack on a conviction other than those at issue. *See State ex rel. Collins v. Superior Court*, 157 Ariz. 71, 75, 754 P.2d 1346, 1350 (1988). It concluded that the court's imposition of consecutive sentences for Porter's murder of two people was appropriate notwithstanding consideration of his 1986 conviction, *see State v. White*, 160 Ariz. 377, 380-81, 773 P.2d 482, 485-86 (App. 1989). Porter's pro se petition for review followed.

¶5 In his petition for review, Porter argues he did not waive his claim on appeal or in his 1998 Rule 32 proceeding because he did not learn of the former judge's convictions until "well after" he filed for post-conviction relief in 1998. Thus, he maintains, the claim is based on newly discovered evidence. He also argues the trial court mistakenly concluded in its order that Porter "seeks to attack his conviction in the present case by arguing that his conviction in [the 1986 case] was illegally obtained." Porter points out that he has not challenged his convictions for the murders, but rather the imposition of consecutive sentences. Finally, Porter argues his sentence probably "would have been different if the sentencing judge knew that the previous conviction was illegally obtained." We will not disturb a court's ruling on a Rule 32 petition absent a clear abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

¶6 A defendant may obtain post-conviction relief by showing "[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict or

sentence.” Ariz. R. Crim. P. 32.1(e). Although the trial court’s order refers to Rule 32.2(a) in finding Porter’s claim precluded, it was mistaken in that respect because a claim of newly discovered evidence is not subject to preclusion under that rule.¹ *See* Ariz. R. Crim. P. 32.2(b). It is, however, subject to other requirements.

¶7 Specifically, Rule 32.2(b) provides that when a defendant is raising a claim of newly discovered evidence pursuant to Rule 32.1(e), he must set forth the substance of the claim and “the reasons for not raising the claim in the previous petition” in his notice of post-conviction relief. And, “[i]f . . . meritorious reasons do not appear [in the notice] . . . indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.” Ariz. R. Crim. P. 32.2(b). Although Porter’s Rule 32 notice described his claim as one of newly discovered evidence, neither his notice nor his subsequent petition below included any explanation of why the claim had not been raised in his two previous Rule 32 proceedings. His claim was thus subject to summary dismissal on that basis alone. *See* Ariz. R. Crim. P. 32.2(b); *cf.* Ariz. R. Crim. P. 32.1(e)(2) (claim of newly discovered evidence requires showing of “due diligence in securing the newly discovered material facts”).

¶8 In his petition for review, Porter argues that it was not until after his 1998 post-conviction relief proceeding was concluded that he learned of Judge Scholl’s 1996

¹We recognize the trial court might find this distinction somewhat technical. In essence, Rule 32.2(b) articulates a mechanism by which courts may determine whether a claim could feasibly have been raised in a prior proceeding—the ultimate criterion for preclusion pursuant to Rule 32.2(a).

conviction. But because he never asserted this as a reason for his delay in bringing the claim, the trial court never had the opportunity to consider or decide whether this explanation constituted a “meritorious reason[]” for Porter’s failure to raise the claim in a previous proceeding. *See* Ariz. R. Crim. P. 32.2(b). As a result, his argument is not properly before us. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review to contain issues “decided by the trial court . . . which the defendant wishes to present to the appellate court for review”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues in petition for review that “have obviously never been presented to the trial court for its consideration”).

¶9 Because we find the trial court did not abuse its discretion in dismissing Porter’s Rule 32 proceeding pursuant to Rule 32.2(b), we do not address his other arguments. Accordingly, although we grant his petition for review, we deny relief.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge